PUBLIC PROSECUTOR

v.

OLADOTUN LUKMANU UMARU & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL REVISION NO. 43-15-90]
4 SEPTEMBER 1990

CRIMINAL PROCEDURE: *Whether Magistrate has power to transfer proceedings to High Court without consent of Public Prosecutor - Sections 39B(3), (4), 41A(1) of Dangerous Drugs Act 1952.*

The 6 accused, all Nigerian Nationals, had been remanded in custody on charges of trafficking in dangerous drugs under s. 39B of the Dangerous Drugs Act 1952 (the Act); the Magistrate subsequently made an order under s. 41A(1) of the Act for transfer of the trial to the High Court; however this was done without the prior consent or requisition of the Public Prosecutor (PP). The issue for determination was whether the Magistrate was right in making that order.

Held:

[1] When a Magistrate makes an order for transmission under s. 41A(1) of the Act that event, although a judicial event, is a further step in the prosecution of the accused (see meaning of prosecution in *Perumal v. PP*) as provided in ss. 39B(3) and 39B(4); this further step is barred until and unless the prior consent of the PP has been obtained.

[2] This view is fortified by the fact that the requirement of a consent of the PP is a well-known safeguard of an accused person charged with certain of the graver offences as it ensures that he is not exposed to the risk of such a prosecution without the intervention of the PP who may after applying his mind to the circumstances of a particular case, exercise his discretion by refusing a consent in which event, the High Court will have no jurisdiction to try the accused for that offence.

[The order for transmission, being a nullity for jurisdiction error is quashed. Case remitted to Magistrate's Court.]

Cases referred to:
Re the Central Provinces and Berar Act No. XIV of 1938 [1939] FCR 18
James v. Commonwealth of Australia [1936] AC 578
Perumal v. PP [1970] 2 MLJ 265

Legislation referred to:
Criminal Procedure Code, Chap. XVII
Dangerous Drugs Act 1952, s. 41A(1)
Prevention of Corruption Act 1961, s. 26(1)

For the applicants - Karpal Singh; M/s. Karpal Singh & Co.
For the respondents - Ahmad bin Haji Maarof, DPP

JUDGMENT

Edgar Joseph Jr J:

In this revision, the sole question for decision was whether the learned Magistrate, Butterworth, was right in making an order, purportedly under s. 41A(1) of the Dangerous Drugs Act 1952 ("the Act"), whereby he transmitted to the High Court, for trial, the case of six accused persons - all Nigerian Nationals - whom he had previously remanded in custody on charges of trafficking in dangerous drugs, to wit, heroin, in contravention of s. 39B, notwithstanding that no prior consent or requisition of the Public Prosecutor for such transfer had been obtained.

In making that order the learned Magistrate had acceded to a submission by Counsel for the accused persons who, incidentally, was supported on this point by the prosecuting officer from the customs department.

The starting point of my enquiry must, of course, be s. 41A(1) which reads as follows:

> (1) Where any case in respect of an offence under this act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate Court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.

Clearly, if s. 41A(1) of the act is read in isolation, there are two events; namely, when the charge relates to an offence triable exclusively in the High Court or when the Public Prosecutor requires the accused to be tried in the High Court, either of which empowers the appropriate subordinate Court to transmit the case for trial in the High Court, without holding a preliminary enquiry under Chapter XVII of the Criminal Procedure Code. In making the order for transmission the learned Magistrate was no doubt swayed by the consideration that the offences charged being punishable on conviction by the mandatory sentence of death were triable exclusively in the High Court, and so there was no requirement for a prior consent or requisition.

It is well to remember the salutary advice of Gwyer CJ in *re the Central Provinces and Berar Act No. XIV of 1938*, 1939 FCR 18, 42:

> A grant of power in general terms standing by itself would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act.

To the same effect, were the words of Lord Wright in *James v. Commonwealth of Australia* [1936] AC 578, 613, when he said:

> The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not in *vacuo* but as occurring in a single complex instrument, in which one part may throw light on another.

Having thus reminded myself as to the correct approach to be adopted in considering the question aforesaid, I would direct attention to s. 39B(3) and (4) of the Act which reads:

> (3) A prosecution under this section shall not be instituted except by or with the consent of the Public Prosecutor:

Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case **shall not be further prosecuted until the consent has been obtained.** (Emphasis supplied).

(4) When a person is brought before a Court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead, and the provisions of the law for the time being in force relating to criminal procedure shall be modified accordingly.

A preliminary question which arises is: when is a prosecution instituted? It is answered for me in *Perumal v. PP* [1970] 2 MLJ 265 wherein the Federal Court had to consider s. 26(1) of the Prevention of Corruption Act 1961, which is in *pari materia* with s. 39B(3) of the Act. In that case, Suffian FJ, speaking for the Court, said that a prosecution is instituted when an accused person is called upon to plead to the charge.

The first impression one therefore gets on reading s. 39B(4) is that since it prohibits an accused from even being called upon to plead to the charge before the Public Prosecutor has consented to his prosecution, it would be sufficient if the required consent is produced in the High Court, it being the Court with exclusive jurisdiction to try capital offences. This is a consideration which would seem to reinforce the position taken by the learned Magistrate who had relied on s. 41A(1).

Reflection reveals that that impression is a false one, for the provisions of the proviso to s. 39B(3), in particular, the last eleven words, state, by way of exception that after an accused is remanded in custody then he "shall not be further prosecuted until the consent of the Public Prosecutor has been obtained". These quoted words were overlooked all round both in the Court below and before me. In my view, when a Magistrate makes an order for transmission under s. 41A(1), that event although a judicial event, is a further step in the prosecution of the accused. It follows that that further step is barred until and unless the prior consent of the Public Prosecutor has been obtained.

I am fortified in this, by the consideration that the requirement of a consent of the Public Prosecutor, is a well known safeguard for an accused person charged with certain of the graver offences as it ensures that he is not exposed to the risk of such a prosecution without the intervention of the Public Prosecutor who may, after applying his mind to the circumstances of the particular case, exercise his discretion by refusing a consent, in which event, the High Court will have no jurisdiction to try the accused for that offence. It follows that the order made by the learned Magistrate, if allowed to stand, would have the effect of depriving the accused persons in this case of that safeguard.

Accordingly, the order for transmission being a nullity for jurisdictional error, was quashed, and the case remitted to the Magistrates' Court, Butterworth, with a direction that it be dealt with according to law.

Also found at [1990] 2 CLJ 1026